Tuan Hj Zulkifli bin Hj Hussain & Ors v IOI Corp Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–438 OF 2003
NALLINI PATHMANATHAN J
20 MAY 2011

Securities — Shares — Rights issue — Mandatory general offer ('MGO') — Control of shares — Defendants acquired more than 33% of issued share capital in company — Plaintiffs minority shareholders — Defendants failed to undertake MGO as required by law — Whether breach of statutory duty to undertake MGO entitled plaintiffs to found private law cause of action in tort for damages — Whether any evidence plaintiffs suffered damages — Construction of s 33A(9) of the Securities Commission Act 1993 — Malaysian Code on Take-Overs and Mergers 1987, r 34.1

The plaintiffs were minority shareholders in Palmco Holdings Bhd ('Palmco'). The second defendant ('LSC') was the managing director of the first defendant ('IOI') while the third defendant was LSC's son and a director of IOI. Between March 1997 and August 1998, the defendants, allegedly acting in concert, acquired more than 33% of the issued share capital of Palmco at RM4.35 per share. This triggered the 33% threshold level prescribed in r 34.1 of the Malaysian Code on Take-Overs and Mergers 1987 ('the Code') which required the defendants to undertake a Mandatory General Offer ('MGO') to purchase the remaining voting shares and warrants in Palmco at RM4.35 and RM2 respectively. The defendants failed to undertake the MGO. This prompted the first plaintiff to request the Securities Commission ('SC') to investigate the matter. By the time the SC made a ruling, the Take-Over and Mergers Code of 1998 had come into force. The SC ruled that IOI and LSC, whose initial actions had triggered the MGO requirement, had breached s 6(4) of the 1998 Code and a public reprimand was handed out. Despite the public reprimand, the SC ruled the defendants were still obliged to carry out the MGO. However, under the law that existed then, the SC had no power to ensure compliance with the Code. An application by the first plaintiff for an order of mandamus against the SC to compel the defendants to undertake a MGO had failed for the same reason. The power to direct compliance only came with amendments, in 1995, to the Securities Commission Act 1993 ('the Act') which amendments came into effect on 1 January 1999. The amendments did not have retrospective effect. As the plaintiffs had failed in their bid to secure a public law remedy, through the mandamus action, to enforce the undertaking by the defendants of the MGO, they filed the instant action, for a private law remedy, by suing the defendants for damages for breach of statutory duty to carry out the MGO. The plaintiffs maintained the Code and the Act existed for the

benefit and protection of minority shareholders and they were entitled to damages or compensation for their breach. On the issue of damages, the plaintiffs divided themselves into two groups based on when they disposed of their shareholding in Palmco. The first group, comprising the first, second, third, fifth and sixth defendants, disposed of their shares in July 2001 when they accepted a conditional mandatory offer from IOI to exit Palmco. The second group, comprising the fourth and seventh plaintiffs, sold their shares on various dates at various prices due to their inability to repay their margin facility. The main issue before the court was whether ss 33A(9) and (10) of the Act read together with the 1987 Code could confer upon the plaintiffs a cause of action in tort founded on breach of statutory duty which entitled them to damages.

Held, dismissing the claim with costs:

(1) The history and wording of ss 33A(9) and (10) of the Securities Commission Act did not lend themselves to the interpretation that Parliament intended to confer a private law remedy in tort (see para 69).

(2) Section 33A(9) presupposed the existence of some other cause of action in respect of which the non-compliance could be adduced as evidence to facilitate the procurement of judgment or to negate liability under that cause of action (see para 72).

(3) Section 33A(9) did not suggest that the fact of non-compliance in itself comprised a basis for a cause of action in tort; neither did it confer an entitlement to compensation or damages for non-compliance of the Code by the 'acquirer' (see para 72).

(4) While the Code and hence the regulatory provisions were enacted for the benefit of a sub-class, namely minority shareholders, this in itself was insufficient to warrant the conclusion that s 33A(9) conferred a private law cause of action in tort against the 'acquirer' for breach of statutory duty (see paras 75–76).

(5) There was no exit from Palmco by the first group of plaintiff shareholders by reason of the takeover of Palmco by the defendants but, in fact, an acquisition by them of further shares and warrants. These plaintiffs finally disposed of their shareholdings at a profit. They were unable to show they suffered any loss (see para 84).

(6) The shares of the second group of plaintiffs were sold by way of foreclosure as a result of the breach of margin limits and margin facility agreements and not because of the acquisition of control of Palmco by the defendants. Accordingly, any damages claimed did not flow from, nor were they a result of, the breach of a statutory obligation by the defendants (see para 86).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan pemegang saham minoriti Palmco Holdings Bhd ('Palmco'). Defendan kedua ('LSC') adalah pengarah urusan defendan pertama ('IOI') manakala defendan ketiga adalah anak LSC dan salah seorang pengarah IOI. Di antara Mac 1997 dan Ogos 1998, defendan-defendan, dikatakan bertindak bersama, memperoleh lebih daripada 33% modal saham terbitan Palmco pada harga RM4.35 satu saham. Ini mencetuskan peringkat nilai ambang 33% yang dinyatakan di dalam k 34.1 Kod Pengambilalihan dan Percantuman Malaysia 1987 ('Kod') yang memerlukan defendan-defendan menerima tawaran mandatori umum ('MGO') untuk membeli baki saham penentu dan waran dalam Palmco masing-masing pada harga RM4.35 dan RM2. Defendan-defendan gagal menerima MGO. Ini menyebabkan plaintif pertama memohon daripada Suruhanjaya Sekuriti ('SC') untuk menyiasat perkara tersebut. Sebelum SC membuat keputusan, Kod Pengambilalihan dan Penggabungan 1998 ('Kod 1998') telah berkuat kuasa. SC memutuskan bahawa IOI dan LSC, yang tindakan awalnya telah, mencetuskan keperluan MGO, telah memungkiri s 6(4) Kod 1998 dan teguran umum diberikan. Walaupun dengan teguran umum tersebut, SC memutuskan bahawa defendan-defendan masih bertanggungjawab untuk menjalankan MGO. Walau bagaimanapun, di bawah undang-undang yang wujud pada masa itu, SC tidak ada kuasa untuk memastikan pematuhan dengan Kod tersebut. Satu permohonan oleh plaintif pertama untuk perintah mandamus terhadap SC untuk memaksa defendan-defendan menerima MGO gagal bagi alasan yang sama. Kuasa untuk mengarahkan pematuhan hanya timbul dengan pindaan yang berkuat kuasa bermula 1 Januari 1999. Pindaan-pindaan tersebut tidak mempunyai kesan kebelakangan. Oleh sebab plaintif-plaintif telah gagal dalam cubaan untuk menjamin remedi undang-undang umum, melalui tindakan *mandamus*, untuk melaksanakan penerimaan MGO oleh defendan-defendan, mereka memfailkan tindakan ini, untuk remedi undang-undang swasta, dengan menyaman defendan-defendan bagi kerugian bagi kemungkiran kewajipan statutori menjalankan MGO. Plaintif-plaintif menyatakan Kod dan Akta wujud untuk faedah dan perlindungan pemegang saham minoriti dan mereka berhak untuk ganti rugi atau pampasan untuk kemungkiran. Atas isu ganti rugi, plaintif-plaintif membahagikan diri mereka ke dua kumpulan berasaskan bila mereka menjual saham dalam Palmco Kumpulan pertama, yang terdiri daripada defendan-defendan pertama, kedua, ketiga, kelima dan keenam, melupuskan saham mereka dalam Julai 2001 apabila mereka menerima tawaran mandatori bersyarat daripada IOI untuk keluar dari Palmco. Kumpulan kedua, terdiri daripada plaintif-plaintif keempat dan ketujuh, menjual saham-saham mereka pada lain-lain hari pada harga yang berbagai-bagai disebabkan oleh ketidakbolehan mereka membayar semula kemudahan margin mereka. Isu utama di mahkamah adalah sama ada s 33A(9) dan (10) Akta dibaca bersama dengan Kod 1987 boleh memberikan kepada

plaintif-plaintif kausa tindakan dalam tort berdasarkan kemungkiran kewajipan statutori yang memberikan hak untuk ganti rugi kepada mereka. A

Diputuskan, menolak tuntutan dengan kos:

(1) Sejarah dan bahasa ss 33A(9) dan (10) Akta Suruhanjaya Sekuriti tidak memberikan kepada mereka tafsiran yang Parlimen berniat untuk memberikan remedi undang-undang persendirian dalam tort (lihat perenggan 69). B

(2) Seksyen 33A(9) mengandaikan kewujudan kausa tindakan yang lain berkaitan dengan mana ketidakpatuhan boleh dikemukakan sebagai keterangan untuk membantu mendapatkan penghakiman atau untuk menafikan liabiliti di bawah kausa tindakan tersebut (lihat perenggan 72). C

(3) Seksyen 33A(9) tidak menyarankan bahawa fakta ketidakpatuhan dengan sendirinya termasuk sebagai asas untuk kausa tindakan dalam tort; ia juga tidak memberikan hak untuk pampasan atau ganti rugi untuk ketidakpatuhan Kod oleh 'acquirer' (lihat perenggan 72). D

(4) Sementara Kod dan peruntukan peraturan digubal untuk faedah subkelas iaitu pemegang saham minoriti, ia dengan sendirinya tidak mencukupi untuk mewajarkan kesimpulan bahawa s 33A(9) memberikan kausa tindakan undang-undang swasta dalam tort terhadap 'acquirer' untuk kemungkiran kewajipan statutori (lihat perenggan 75–76). E

(5) Tidak ada jalan keluar daripada Palmco oleh kumpulan pertama plaintif disebabkan oleh pengambilalihan Palmco oleh defendan-defendan tetapi, sebenarnya, pengambilalihan saham-saham dan waran selanjutnya oleh mereka. Plaintif-plaintif ini akhirnya melupuskan pemegangan saham mereka untuk keuntungan. Mereka tidak boleh menunjukkan bahawa mereka mengalami kerugian (lihat perenggan 84). F G

(6) Saham-saham kumpulan kedua plaintif dijual melalui penutupan disebabkan oleh kemungkiran had margin dan perjanjian kemudahan margin dan bukan kerana pengambilalihan kawalan Palmco oleh defendan-defendan. Dengan itu, apa-apa ganti rugi yang dituntut tidak bermula dan bukan disebabkan oleh kemungkiran kewajipan statutori oleh defendan-defendan (lihat perenggan 86).] H

Notes

For a case on adoption, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) para 965. I

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

A *Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor* [2003] 6 MLJ 49; [2003] 8 CLJ 32, HC (refd)
Chin Yew Loy Holdings Sdn Bhd lwn AU Metalvest (M) Sdn Bhd [2002] 2 MLJ 117, HC (distd)
Cutler v Wandsworth Stadium Ltd [1949] AC 398, HL (refd)
B *Doe d Bishop of Rochester v Bridges* (1831) 1 B & Ad 847 (refd)
Ex parte Island Records Ltd [1978] Ch 122, CA (refd)
Extreme System Sdn Bhd v Ho Hup Construction Company Bhd & Ors [2010] MLJU 486 (refd)
Fytche v Wincanton Logistics Plc [2004] 4 UKHL 31, HL (refd)
C *Gorris v Scott* (1874) LR Ex 125 (refd)
Groves v Lord Wimborne [1898] 2 QB 402, CA (refd)
Henderson v Henderson (1843) 3 Hare 100 (refd)
Hewitson v Hewitson [1995] 1 All ER 472, CA (refd)
D *Lonrho Ltd v Shell Petroleum Co Ltd & Anor (No 2)* [1982] AC 173, HL (refd)
Melton Medes Ltd and another v Securities and Investments Board [1995] 3 All ER 880 (refd)
Monk v Warbey and others [1935] 1 KB 75, CA (refd)
Petaling Tin Bhd v Lee Kian Chan & ors [1994] 1 MLJ 657, SC (refd)
E *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 1 KB 539 (refd)
Regina v Deputy Governor of Parkhurst Prison And Others, Ex parte Hague & Weldon Respondent and Home Office Respondent (conjoined appeals) [1992] 1 AC 58, HL (refd)
Smith v Linskills (a firm) [1996] 2 All ER 353, CA (refd)
F *Tan Chye Choo & Ors v Chong Kew Moi* [1966] 2 MLJ 4, FC (refd)
X (Minors) v Bedforshire CC [1995] 3 WLR 152, HL (refd)

Legislation referred to

G Companies Act 1965 ss 179, 179(3), (7)
Financial Services Act 1986 [UK]
Malaysian Code on Take-Overs and Mergers 1987 rr 2, 34, 34.1, 34.1(a), 34.7
Malaysian Code on Take-Overs and Mergers 1998 s 6(4)
Motor Vehicles (Construction and Use) Rules 1959 r 94
H Prison Rules of 1964 [UK]
Securities Commission Act 1993 ss 32, 32A, 32B, 33, 33(9), (10), 33A, 33A(6), (7), (8), (9), (10), 33B, 33C, 33D, 33D(1)(a), 33D(3), 33E, 34, 34A, 34B, 34C
Securities Industry Act 1983 s 46

I *Robert Lazar (Lai Wai Fong with him) (Shearn Delamore & Co) for the plaintiffs.*
Rutheran (R Sivagnanam & Assoc) for the first defendant.
M Pathmanathan (M Pathmanathan & Co) for the second defendant.
Loh Siew Cheang (Brian Foong with him) (Cheang & Ariff) for the third defendant.

Nallini Pathmanathan J:

INTRODUCTION

[1] The plaintiffs' claim against the defendants is for damages arising from a breach of statutory duty. The breach in issue is the failure or refusal of the defendants to undertake a mandatory general offer to purchase the remaining voting shares in Palmco Holdings Bhd ('Palmco') after having acquired, between March 1997 and August 1998, allegedly in concert, slightly more than 33% of the issued share capital of Palmco.

SALIENT FACTS

[2] The plaintiffs in this suit were, in 1997, minority shareholders in Palmco Holdings Bhd ('Palmco'). In March 1997 the board of directors of the first defendant, IOI Corp Bhd ('IOI') resolved to acquire some 52,463,000 equivalent to 32.96% of the issued share capital of Palmco from Mega First Corp Bhd at the price of RM4.35 per share. On 24 March 1997 IOI announced its commitment to make the said acquisition. On 25 March 1997 IOI acquired a further 38,000 shares representing 0.024% of the issued share capital of Palmco. On the same day the second defendant, Tan Sri Dato' Lee Shin Cheng ('the second defendant') who is the managing director of IOI, acquired 77,000 or 0.048% of the issued share capital of Palmco. He subsequently disposed of these 77,000 shares on 8 April 1997. The plaintiffs contend that the cumulative effect of the acquisitions at this stage by IOI in March 1997, directly or indirectly through its director, who was acting in concert with it, amounts to 33.032% of the issued share capital of Palmco. This triggered the 33% threshold level prescribed in r 34.1 of the Malaysian Code on Take-Overs and Mergers 1987 ('the 1987 Take-Over Code') which required the first and second defendants to undertake a mandatory offer.

[3] Subsequently on 23 June 1998, the third defendant, Lee Yeow Chor, ('the third defendant') a director of IOI and the son of the second defendant, acquired 20,000 Palmco shares and on 12 August 1998 a further 50,000 Palmco shares from the open market. The aggregate number of shares acquired therefore amounted to 70,000 or 0.046% of the issued share capital of Palmco. The plaintiffs contend that as there was an unfulfilled duty on the part of IOI and LSC to undertake a mandatory offer which remained unfulfilled as of August 1998, the third defendant likewise became obliged to undertake a mandatory offer on terms no less favourable that that incumbent upon the first and second defendants. The plaintiffs' claim is premised on the rebuttable presumption that the second and third defendants who were the managing director and director respectively of the first defendant, were acting in concert

with the first defendant.

INVESTIGATIONS BY THE SECURITIES COMMISSION

[4] Further to requests for investigation by the first plaintiff, the Securities Commission sought explanations from the first and second defendants in relation to the first set of acquisitions in March 1997. On 5 February 1999, the Securities Commission made a ruling requiring the first and second defendants to undertake a mandatory offer. These two defendants appealed against the decision of the Securities Commission in April 1999. The Securities Commission responded by issuing a statement on 28 May 1999 stating that:

(a) The first and second defendants had breached s 6(4) of the Malaysian Code on Take-Overs and Mergers 1998 ('the 1998 Take-Over Code'); and

(b) having considered the appeals the appropriate remedy to be handed out was a public reprimand.

[5] No mandatory offer was undertaken by the first and second defendants. On 1 June 1999, the Securities Commission informed the first and second defendants that notwithstanding the public reprimand they remained under an obligation to undertake a mandatory offer.

[6] The first plaintiff took up the failure of the defendants to undertake a mandatory offer with the Securities Commission urging them to ensure compliance with the Securities Commission Act and the Take-Over Code. The response from the Securities Commission was that the public reprimand did not relieve the first and second defendants from undertaking their obligation to extend a mandatory general offer. However it maintained that it could not exercise its powers under the Securities Commission Act to ensure compliance with the Code. The Securities Commission also confirmed to the first plaintiff that these defendants were obliged to undertake the mandatory general offer as of 25 March 1997.

[7] In so far as the third defendant is concerned, the first plaintiff lodged a complaint to the Securities Commission on 27 June 2000 about his acquisition of 70,000 Palmco shares ('the additional acquisition'). A show cause letter was issued by the Securities Commission to all three defendants on the premise that they were parties acting in concert, seeking an explanation as to why the relevant disclosures had not been made. The third defendant responded to and explained that his acquisitions were undertaken entirely separately and independently, and had no nexus to his position as director in the first defendant. In short he denied that he had at any time, acted in concert with the first and/or second defendants. There was no further action taken by the

Securities Commission.

SUBSEQUENT MANDATORY GENERAL OFFER

[8] In July 2001 Sime Darby made a conditional voluntary offer to acquire Palmco shares at RM4.35 per share. The first defendant then made a conditional mandatory offer on 16 July 2001 to Palmco shareholders at RM4.35 per share which was revised to RM4.60 per share two days later. The first defendant completed its mandatory general offer of Palmco shares at RM4.60 per share on 18 October 2001.

THE PLAINTIFF'S GRIEVANCE IN THIS CIVIL SUIT

[9] The plaintiffs in this suit complain that the defendants have failed to adhere to or comply with the requirement that they make a mandatory general offer in breach of the obligations imposed by the 1987 Take-Over Code and the Securities Commission Act 1993, the legislation then prevailing. The plaintiffs maintain that these statutory provisions were enacted for the benefit and protection of minority shareholders. In view of the breach of these statutory provisions by the defendants, and their refusal to comply with the express directives of the regulatory body, namely the Securities Commission, the plaintiffs maintain that they are entitled to damages for these deliberate breaches of statutory duty. In essence the plaintiffs claim that the then prevailing provisions of the Securities Commission Act 1993 allow them to claim damages or compensation from the defendants for a breach of statutory duty in failing or refusing to undertake a mandatory general offer in compliance with the 1987 Take-Over Code.

THE MANDAMUS SUIT INITIATED BY THE FIRST PLAINTIFF

[10] Prior to the institution of this suit, the first plaintiff had sought to procure from the High Court an order of mandamus against the Securities Commission ordering it to direct IOI and LSC to comply with, and observe, the provisions of the 1998 Take-Over Code and in particular to make a mandatory offer to acquire the remaining shares and warrants in Palmco Holdings Bhd not owned by them at a price of RM4.35 and RM2 respectively. Additionally, it sought an order that IOI and LSC be ordered to compensate the shareholders of Palmco for the losses suffered by the delay in making the order. In short the first plaintiff sought vide the judicial review application to procure the enforcement of the requirement to make a mandatory general offer under the Take-Over Code via the enforcement or regulatory body, namely the Securities Commission. This was a public law remedy. Vide such an order it was sought to procure that a mandatory general offer was made by IOI and the

second defendant on the grounds that the threshold level prescribed in the Take-Over Code as a consequence of acquisitions by these defendants acting in concert had been triggered.

[11] The motion for judicial review was heard and adjudicated upon by Abdul Aziz JCA. His Lordship held in essence, that the court was unable to direct mandamus as sought by the first plaintiff because the relevant legislation prevailing then did not allow for the grant of such relief. The power to direct compliance is to be found in para (a) of s 33D(1) of the Securities Commission Act which only came into effect on 1 January 1999 and had no retrospective effect. Accordingly it could not be exercised in respect of defaults occurring prior to 1 January 1999, as was the case here. The court therefore held that there was no question of the commission being ordered by mandamus to act under that section. For the purposes of the instant case, His Lordship's judgment is relevant particularly in relation to his exposition of the legislation prevailing at the time.

THE THEN PREVAILING STATUTORY PROVISIONS

[12] In the judgment in the mandamus suit Abdul Aziz JCA (as he then was) set out the full background of the Malaysian Code on Take-Overs and Mergers 1987. It had been in force since 1 April 1987 and had been made by the panel on Take-Overs and Mergers pursuant to powers conferred under s 179(3) of the Companies Act 1965.

[13] On 1 March 1993 the Securities Commission Act 1993 came into force. Section 33 of this Act provided for the creation of a code to be prepared by the Commission and approved by the minister containing general principles and rules to be complied with by all parties concerned in a take-over and merger transaction. However no new code was promulgated or utilised. The 1987 Code remained in existence and continued to be valid by virtue of s 46 of the Securities Industry Act 1983, notwithstanding the repeal of s 179 of the Companies Act. In effect the 1987 Code was deemed to be made under s 33 of the Securities Commission Act 1993 by virtue of the said s 46.

[14] The relevant provisions of the Take-Over Code 1987 for the purposes of this case are as follows:

> Rule 34.1(a) of the 1987 Code —
>
> Except with the consent of the panel, or unless otherwise directed by the Panel where:
>
> (a)*Any person acquires*, whether by a series of transactions over a period of time or not, *shares which* (taken together with shares held or acquired by persons acting in concert with him) *carry more than 33% of the voting rights of a company*;

Such person shall extend within a reasonable period of time an offer on the basis set out below to the holders of any class of share capital which carries votes and in which such person or persons acting in concert hold shares. In addition to such person, each of the principal members of the group of persons acting in concert may, according to the circumstances of the case, have an obligation to extend an offer. (Emphasis added.)

[15] The definition of 'acting in concert' a term used in r 34.1 was defined in r 2. Rebuttable presumptions comprise a part of the definition. According to presumption (two) a company was presumed to be a person acting in concert with any of its directors. Applying these definitions to the factual matrix outlined above, the contention was that by application of the presumption, the second defendant, as IOI's director was acting in concert with IOI and since the shares held collectively by them on 25 March 1997 computed cumulatively carried more than 33% of the voting rights of Palmco, IOI was obliged by r 34.1(a) to make a general offer and LSC, by application of the definition would also have an obligation to extend an offer. As this was not done what were the repercussions?

[16] The failure to comply with r 34.1(a) of the Take-Over Code carries sanctions in the Securities Commission Act 1993 which provides in ss 33(9) and (10) as follows:

(9) Subject to subsections (6), (7) and (8), a failure by any party concerned in a take-over or merger transaction to observe any of the general principles and rules in the Code shall not of itself render that party liable to criminal proceedings but any such failure may, in any proceedings, whether civil or criminal be relied upon by any party to the proceedings as tending to establish or to negate any liability which is in question in the proceedings.

(10) Notwithstanding subsection (9), where any party concerned in a take-over or merger transaction fails to observe any of the general principles and rules in the Code, the Commission may, after giving the party an opportunity to be heard, invoke such sanction as private reprimand, public censure or temporary or permanent deprivation of enjoyment of the facilities of a stock exchange as it deems fit...

[17] Abdul Aziz JCA then considered the effects of the Securities Commission Amendment Act 1995 (Act A926) which came into effect on 1 January 1999.

[18] This amendment in Part IV replaced the original Part IV of the 1993 Act entitled 'Issues of Securities and Take-Overs and Mergers' with the same title but introduced thirteen sections. It was split into two divisions. Division

A One concerns securities and comprises ss 32 to 32B. Division Two concerns takeovers, mergers and compulsory acquisitions, and comprises the rest of the ss 33 to 34C.

B **[19]** Division Two of Part IV was brought into force on 1 January 1999. The relevant amendment for the purposes of the instant case was the new s 33D. It provided for powers of enforcement by the Securities Commission and on further default, provision for the court to ensure compliance. The Securities Commission was accorded the power to, inter alia, '... direct the defaulting C person to comply with, observe or give effect to any such provision of the Code or ruling'.

[20] Further, '... s 33D(3) provided that: '... The Court may, in a case where the Commission gives a direction under paragraph (1)(a), on an application by D the Commission, make an order directing the defaulting person to comply with, observe or give effect to those provisions of the Code or rulings …'

[21] The first plaintiff had sought an order of mandamus under the E foregoing provisions against the Securities Commission to direct them to enforce IOI and LSC's obligations to make a mandatory general offer. The court however held that the true position in law was that the power to direct compliance given by para (a) of s 33D(1) was not retrospective and could not be exercised in respect of defaults occurring before 1 January 1999. The F Commission could not therefore be ordered by mandamus to act under that section as sought by the first plaintiff.

[22] From the decision of Abdul Aziz JCA in the mandamus suit, it is beyond G question that the prevailing legislation between March 1997 and August 1998 was the 1987 Code and the Securities Commission Act 1993, prior to the Amendment Act A926 taking effect. In other words, the additional enforcement powers accorded to the Securities Commission to direct the defaulting party to comply with the Code, and the ability to take the matter to H court to enforce such a direction, was not available as of the material dates, ie between March 1997 and August 1998. Those powers could not therefore be exercised by the Securities Commission until 1 January 1999. This brought about the result that an order of mandamus could not ensue against the Securities Commission to order it to enforce compliance with the Take-Over I Code by IOI and LSC.

[23] It is evident from the foregoing that vide the mandamus suit the first plaintiff sought a public law remedy to seek enforcement of the Take-Over Code via the regulatory body, namely the Securities Commission.

THE PRESENT SUIT — IS A CLAIM PREMISED ON A BREACH OF STATUTORY DUTY ('THE BREACH TORT') MAINTAINABLE?

[24] The first plaintiff failed to secure a public law remedy to enforce the undertaking of a general offer by IOI and LSC. In this suit, the plaintiffs pursue a private law remedy premised on a breach of statutory duty, commonly termed a breach tort. The plaintiffs maintain that as IOI, LSC and the third defendant have 'acted in concert' and failed to comply with the provisions of the Take-Over Code, they have breached their statutory obligation under the Code, which breach it is said, entitles the plaintiffs to compensation or damages. The breach in question is the failure of the three defendants to undertake a mandatory general offer after the threshold 33% acquisition level was triggered in March 1997 and August 1998.

[25] The first issue that arises for consideration therefore, is whether the prevailing legislation, namely ss 33A(9) and (10) read together with the 1987 Take-Over Code confer upon the plaintiffs a private law cause of action founded in breach of statutory duty, entitling them to recover general damages and exemplary damages.

[26] The plaintiffs submit that they accept that as the Securities Commission Act 1993 and the 1987 Code stood at the material time, there was no conferral of an express cause of action giving rise to damages in the prevailing legislation. They maintain that whether a breach of a statutory duty does give rise to a private law cause of action is a question of construction. The relevant sections in relation to this issue are s 33A(9) and (10) which have been reproduced above.

[27] Subsection 9 of s 33A provides that subject to sub-s (6), (7) and (8), where a party concerned in a take-over or merger transaction has failed to observe any of the rules set out in the then prevailing 1987 Code, that failure shall not render the party liable to criminal proceedings. However it goes on to state that the failure to comply with the Code may be utilised in 'any' proceedings, albeit civil or criminal, as tending to establish or negate any liability in question in the proceedings. Subsection 10 provides that where there has been a failure to observe the Code, the Securities Commission may, after having accorded the party an opportunity to be heard, invoke the sanctions of a private reprimand, public censure or a temporary or permanent deprivation of enjoyment of the facilities of the stock exchange as it deems fit.

[28] Rule 34 and the rest of the Take-Over Code do not prescribe any sanctions nor touch on a failure to comply with the provisions of the Code. To that extent the Code itself provides no clues on how a failure to adhere to its

principles is to be treated. That is an issue for the regulatory body, the Securities Commission and the relevant provisions have been set out above.

[29] The issue for construction here is whether s 33A(9) and (10), construed in the context of the Act and the 1987 Take-Over Code, confer on the plaintiffs as minority shareholders, a right to claim damages against the defendants for their 'breach' of the obligation or duties circumscribed under the Take-Over Code and the Securities Commission Act 1993. It is necessary to ascertain the legislative intent of these provisions, and whether they confer such a right upon minority shareholders such as the plaintiffs. How is such legislative intention to be ascertained? (It is pertinent to note that for the purposes of dealing with this issue, I have presumed that the defendants are in breach of the Code, a fact which is denied by the defendants. That however is a different issue. For purposes of ascertaining legislative intent, such breach is assumed).

CONSTRUCTION OF THE RELEVANT LEGISLATION TO ASCERTAIN WHETHER IT CONFERS A CAUSE OF ACTION IN PRIVATE LAW —THE TORT OF A BREACH OF STATUTORY DUTY

[30] Francis Bennion the author of *Bennion on Statutory Interpretation* (5th Ed) in his chapter on Civil Sanction for Disobedience summarises the problem thus:

(1) The remedies, if any, available for a breach of statutory duty depend on the legislative intention. This may be that there shall be a special remedy laid down either by the enactment creating the duty or a related enactment, or that a general remedy shall apply, or both. An applicable special or general remedy may be criminal or civil. The legislative intention may be that there shall be no legal remedy.

(2) Subject to any contrary legislative intention the breach may give rise in civil law to a general public law remedy, or a general private law remedy, or both.

(3) In public law, the breach may be remediable by judicial review.

(4) I private law, the breach may constitute the tort of breach of statutory duty ('the breach tort') or the tort of negligence; or some other general remedy may apply.

(5) ...

(6) The sanctions available for the breach tort in damages or otherwise arise at common law and are the same as for tort generally.

(7) Where no relevant enactment specifies that the breach shall or shall not constitute the breach tort, the considerations set out in subsections

(8) to (15) below may affect the question of whether by implication the breach is intended to constitute that tort.

...

[31] It is evident from the foregoing that in construing ss 33A(9) and (10) in conjunction with the Take-Over Code, it is necessary to ascertain whether the legislative intention was to afford a civil remedy in private law sounding in damages, such that the breach of the 1987 Take-Over Code by the defendants, entitles the plaintiffs to bring an action in tort against the defendants for a breach of statutory duty, or the breach tort, as Bennion describes it. It is not every breach of a statutory duty or obligation that gives right to a claim sounding in damages. That is a matter of statutory interpretation with a view to ascertaining legislative intent.

[32] In *Tort Law* (3rd Ed) by Nicholas J MacBride and Roderick Bagshaw the authors explain the issue thus: … By definition the breach of a statutory duty that is owed to no one in particular cannot amount to a tort. But even the breach of a statutory duty that is owed to another will usually not amount to a tort. *The breach of a statutory duty that is owed to another will only amount to a tort if when Parliament created that duty it intended that breach of that duty should be treated as a tort by the courts and therefore that all the remedies that are normally available when someone has committed a tort should apply to the breach of that statutory duty. As this is a bit of a mouthful, let's just say that the breach of a statutory duty owed to another will only amount to a tort if Parliament intended, when it created that duty, that breach of that duty should be 'actionable in tort'.* (Emphasis added.)

[33] How then is it to be determined whether Parliament intended that a breach of the Take-Over Code should give rise to an actionable tort or not? What are the guiding principles to be utilised in determining when it is appropriate to allow a personal civil action based on the breach of a statutory obligation? I have considered a series of decisions handed down by the English Courts, for persuasive guidance, prior to the leading Malaysian cases on point. The English cases are considered because they offer a comprehensive overview of the guidelines and principles that are applicable in statutory interpretation. In any event the Malaysian authorities have relied upon authorities from the same jurisdiction.

[34] Learned counsel for the plaintiffs, Mr Robert Lazar, relied, as a starting point on the speech of Lord Simmonds in *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at p 407:

> ... It is, I think true that it is often a difficult question whether, where a statutory obligation is placed on A, B who conceives himself to be damnified by A's breach of it has a right of action against him. But on the present case I cannot entertain any doubt. I do not propose to formulate any rules by reference to which such a question can infallibly be answered. The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications

which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the house. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration.

[35] In *X (Minors) v Bedforshire CC* [1995] 3 WLR 152 at pp 165 and 166, a decision of the House of Lords, Lord Browne-Wilkinson explained the mode of ascertaining Parliament's intention thus:

... General approach

Introductory — public law and private law

The question is whether, if Parliament has imposed a statutory duty on an authority to carry out a particular function, a plaintiff who has suffered damage in consequence of the authority's performance or non-performance of that function has a right of action in damages against the authority. It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action …

Private law claims for damages can be classified into four different categories, viz: (A) actions for breach of statutory duty simpliciter (ie irrespective of carelessness); (B) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action; (C) actions based on a common law duty of care arising of it; (D) misfeasance in public office, ie the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful …

(A) Breach of statutory duty simpliciter

This category comprises those cases where the statement of claim alleges simply (a) the statutory duty, (b) a breach of that duty, causing (c) damage to the plaintiff. The cause of action depends neither on proof of any breach of the plaintiffs' common law rights nor on any allegation of carelessness by the defendant.

The principles applicable in determining whether such statutory cause of action exists are now well established although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no

method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cutler v Wandsworth Stadium Ltd* [1949] AC 398; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173. However the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages notwithstanding the imposition by the statutes of criminal penalties for breach: see *Groves v Wimborne (Lord)* [1898] 2 QB 402.

Although the question is one of statutory construction, and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty …

... Thus legislation regulating the conduct of betting or prisons did not give rise to a statutory right of action vested in those adversely affected by the breach of the statutory provisions, ie bookmakers and prisoners: see *Cutler's case; Reg v Deputy Governor of Parkhurst Prison, Ex parte Hague* [1992] 1 AC 58. The cases where a private right of action for breach of statutory duty have been held to arise are all cases where the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions.

[36] In *X (Minors) v Bedforshire CC* (above) Lord Browne-Wilkinson concluded that no such cause of action was conferred by the statutes in question, stating, inter alia, that it would require exceptionally clear statutory language to show a parliamentary intention that those responsible for carrying out functions in an administrative system designed to promote the social welfare of the community, should be liable in damages, if it was shown that they had failed to discharge their statutory duties. While it was acknowledged that in that case, like the present, the legislation was introduced primarily for the protection of a limited class and that until 1991 the legislation itself contained only limited machinery for enforcing the statutory duties imposed, those were only 'pointers in favour of imputing to Parliament an intention to create a private law cause of action'. However the actual words used in the primary legislation were inconsistent with any intention to create a private law cause of action. Accordingly it was concluded that no such private law cause of action subsisted.

[37] In *Regina v Deputy Governor of Parkhurst Prison And Others, Ex parte Hague & Weldon Respondent and Home Office Respondent (conjoined appeals)* [1992] 1 AC 58 the first of two appeals related to a situation where the

applicant, a prisoner serving a lawfully imposed prison term, sought judicial review against the deputy governor's decision to transfer and segregate him. He sought damages for false imprisonment in this context. One of the issues that arose for consideration was whether a breach of the Prison Rules of 1964 could found a private law claim for damages by a prisoner. The House of Lords allowed the striking out of the applicant's claim on appeal, on the basis that there was no reasonable cause of action. They held, inter alia, that the question of whether an enactment conferred private law rights of action on individuals in respect of its breaches, depended on the intention of the legislature, and the fact that a particular provision was intended to protect certain individuals was not of itself sufficient to confer such rights. It was further held that nothing in the Act suggested that in the case of a breach of its provisions, Parliament intended to confer on prisoners a cause of action sounding in damages; and finally that the Prison Rules 1964 were regulatory in character, providing a framework within which the prison regime operated but were not intended to protect prisoners against loss, injury and damage nor to give them a right of action. In arriving at this conclusion the reasoning of Lord Goff of Chieveley is instructive as His Lordship analysed and dismissed the contention that the protection of a specific class of persons coupled with the lack of any form of criminal sanction, was sufficient basis to impute in a statute an intention to confer a civil law right of action sounding in damages under the Prison Rules 1964. This is what was said: *Breach of statutory duty*

[38] Mr Sedley for Hague submitted that there had been a breach of the prison rules which sounded in damages. In a carefully reasoned argument to which I hope that I do justice in paraphrasing, he argued that a breach of statutory duty unaccompanied by a statutory remedy or penalty affords a right of action to a person injured thereby where the plaintiff belongs to a class which the statutory provision was intended to protect, and the breach has caused the plaintiff damage of a kind which the provision was intended to protect him. In support of this proposition he relied on *Groves v Lord Wimborne* [1898] 2 QB 402 and *Cutler v Wandsworth Stadium Ltd* [1949] AC 398.

[39] His Lordship then considered the foregoing cases before citing *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173:

> ... Lord Diplock referred to the general rule that where an Act creates an obligation and enforces the performance in a specified manner the performance cannot be enforced in any other manner and then set out one or two exceptions to the rule, at p 185:
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> The first is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation.

This exception was referred to by Lord Bridge of Harwich in *P v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370, 420 in the following terms:

> But in order to fall within the principle which Lord Diplock had in contemplation it must, in my opinion, appear upon the true construction of the legislation in question that the intention was to confer on members of the protected class a cause of action sounding in damages occasioned by the breach.
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> ...
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> My Lords, I take from these authorities that it must always be a matter for consideration whether the legislature intended that private law rights of action should be conferred upon individuals in respect of breaches of the relevant statutory provision. The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment.
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> The Prison Act 1952 is designed to deal with the administration of prisons and the management and control of prisoners. It covers such wide ranging matters as central administration, prison officers, confinement and treatment of prisoners, release of prisoners on licence, provision and maintenance of prisons and offences. Its objects are far removed from those of legislation such as the factories and coal mines Acts whose prime concern is to protect the health and safety of persons who work therein...
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> ...
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> I find nothing in any of the other sections of the Act to suggest that Parliament intended thereby to confer on prisoners a cause of action sounding in damages in respect of a breach of those provisions.

It was therefore concluded that no private law cause of action could be construed as having been intended to be conferred on a breach of these statutory rules which carried the force of law.

[40] In the case of *Melton Medes Ltd and another v Securities and Investments Board* [1995] 3 All ER 880 the plaintiffs there brought an action against the Securities and Investments Board in the United Kingdom, alleging that it had contravened certain sections of the Financial Services Act 1986 ('FSA') by disclosing restricted information, and that but for such disclosure, the plaintiffs would have been able to settle certain beneficiaries' actions on beneficial terms. It was contended that since the Securities and Investments Board had acted in bad faith it was liable in damages pursuant to a particular provision of the FSA. The Securities and Investments Board sought to strike out the action alleging that it did not disclose any reasonable cause of action. In allowing the plaintiffs' action to be struck out Lightman J considered that the plaintiffs' action rested on the premise that the statute conferred a private law action where there was disclosure without the consent of those to whom such a right had been accorded. Whether or not such a private right is created, it was reiterated, must

be a matter of construction of the statute in question. His Lordship then went on to consider the principles to be applied in seeking to construe legislative intent:

> ... The task of divining the legisiature's intent when not expressly stated often requires sensitive antennae. But the authorities have suggested certain guidelines which may be of assistance. Indications of the conferment of a private right include the absence of any remedy by way of penalty or otherwise in case of breach and the special character of the legislation, eg where it is designed to afford protection to those exposed to risk of personal injury. Contra-indications include the statutory provision of a criminal sanction for breach, the requirement in performance of the duty for the exercise of a subjective judgment or a balancing of competing interests and (in particular) the public interest, and the indeterminate or indeterminable nature of the class of individuals on which any such right would be conferred (see *M (a minor) v Newham London BC, X and ors (minors) Bedfordshire CC* [1994] 4 All ER 602, …). In each case however the primary focus must be on the terms of the statute in question.

[41] In concluding that no such private law action subsisted, Lightman J held that while the Financial Services Act 1986 created an elaborate scheme of duties backed by a mix of enforcement mechanisms, each mechanism was earmarked to a duty in question. In that piece of legislation the sanction for a breach of the relevant s 179 on disclosure allowed for criminal prosecution and he held that this was of the highest significance, thereby precluding any inference of any further or other private law right or remedy. Two other factors were considered as reinforcing this view. His Lordship considered that the role of the Securities Investment Board was as a senior regulator in the public interest and specifically in the interest and for the protection of investors. The purpose of the section in question was to control, in the public interest, the use and dissemination of information acquired rather than to subject the board to private law actions. This could be sufficiently safeguarded by judicial review. Secondly the creation of a statutory private right would amount to recognising a new category of non-confidential information in respect of which a private right to non-disclosure exists. As such it was concluded that no cause of action was conferred by the relevant section.

[42] From the foregoing cases, the guiding principles to be gleaned are that:

(a) As a general rule 'where an Act creates an obligation and enforces the performance in a specified manner that performance cannot be enforced in any other manner' (see Lord Tenterden CJ in *Doe d Bishop of Rochester v Bridges* (1831) 1 B & Ad 847);

(b) Lord Diplock in *Lonrho v Shell Petroleum Co* (above) recognised two exceptions to this general rule, the first exception being relevant here, namely where the obligation or prohibition was imposed for the benefit

or protection of a particular class of individuals. The second exception relates to a situation where the statute creates a public right, which is not directly relevant in the context of the present case;

(c) the fact that a statute was unquestionably passed for the protection of a specific class of individuals is not conclusive, for example, child protection legislation: (see *X (minors) v Bedforshire CC* [1995] 3 WLR 152) (above);

(d) where the statute imposes a duty and provides an adequate remedy for its breach of some other means of enforcement, this militates against the existence of an action for breach of statutory duty. Conversely where the statute does not provide a remedy the assumption is that there will be a cause of action for a breach of the duty entitling the person injured to compensation or damages; and

(e) where it seems that breach of the statute is actionable, the circumstances in which the claimant sustains harm must fall within the terms of the defendant's statutory duty. Additionally the damage suffered by the claimant must be of the kind that the statute was intended to prevent.

[43] Although I have sought to set out with some degree of certainty the guidelines to be adopted in seeking to ascertain Parliamentary intent, a consideration of the case-law relating to whether or not an action is available for a breach of statute will show that the reality is otherwise. So much so that this issue warranted the oft-cited phrase by Lord Denning in *Ex parte Island Records Ltd* [1978] 1 Ch 122 to the effect that the issue may as well be decided by the toss of a coin.

[44] Prior to a consideration of the Malaysian cases relating to this point, a soupcon of caution needs to be sounded. In all the cases set out above, the issue before the courts has related primarily to whether the breach of a statutory duty owed by a public authority or statutory body to a person, allowed the latter to institute a private law cause of action in tort against that public authority or statutory body.

[45] In the instant case however the plaintiffs seek to sue not the statutory regulator, namely the Securities Commissions but the 'acquirer' under the Take-Over Code, namely the defendants allegedly acting in concert. In short the defendants are not a public authority or statutory body entrusted to carry out specific duties. The defendants are instead individuals who have been accorded an obligation by statute under the Take-Over Code to make a general offer upon the trigger of the 33% threshold being reached. This obligation imposed by statute is not akin to the statutory duty imposed on various regulatory authorities.

[46] Accordingly, in the instant case it appears that the question is whether a failure to comply with an obligation imposed by the Take-Over Code on the part of an 'acquirer' as defined, allows the minority shareholders to rely on the regulating statute, namely the Securities Commission Act or the Code itself to found a cause of action in breach tort for damages. This is to be contrasted with a breach of statutory duty by a statutory authority such as the Securities Commission and whether a cause of action in damages is conferred on the 'injured' party upon a breach of its statutory duties under the relevant statute. In construing ss 33A(9) and (10) this distinction is to be kept in mind. It is the obligation imposed by statute on the acquirer that is the subject matter of consideration here, not the statutory duties of the regulator, namely the Securities Commission.

[47] Be that as it may, the issue that falls for consideration here is whether, having considered the case law above and the guidelines set out above, it can be concluded that there exists a cause of action in tort for the plaintiffs arising from the defendant-acquirer's failure to undertake a mandatory general offer when the threshold 33% of Palmco was breached between March 1997 and August 1998.

[48] The relevant Malaysian authorities to be considered in this jurisdiction are the Supreme Court decision in *Petaling Tin Bhd v Lee Kian Chan & ors* [1994] 1 MLJ 657 *('Petaling Tin')* and the High Court decision of *Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor* [2003] 6 MLJ 49.

[49] The issue that arose for consideration in *Petaling Tin* (above) was whether the imposition of a sanction such as a public censure by the panel on take-overs and mergers had the automatic effect in law of releasing the 'concert parties' from their obligations and restrictions under the Code, including the undertaking of a mandatory general offer, or whether such obligations and restrictions under the Code continued, notwithstanding such reprimand, until the general offer was made. The Supreme Court held that the imposition by the panel of a reprimand such as a public censure did not have the automatic effect of releasing the concert parties from the obligations and restrictions imposed on them by rr 34.1 and 34.7 of the Code; and that such obligations and restrictions continued in force unless the panel consented otherwise, or until there was compliance with the direction to make a mandatory general offer. In short the reprimand issued by the regulating body, now the Securities Commission did not in itself negate the continuing obligation imposed by the Code. The reason given was that if in fact such a reprimand had the effect of excusing or negating the statutory obligation, then the whole purpose of the Code could be frustrated and circumvented by deliberate non-compliance. It was also described as illogical and unsatisfactory to draw the conclusion that the reprimand could remove the very obligation the breach of which had

resulted in the imposition of such reprimand. An analogy was drawn with the imposition of a penalty for failure to pay income tax, the payment of which did not exonerate or relieve the tax-payer from the obligation to pay the tax in the first place. It is evident from *Petaling Tin* (above) that the obligation(s) and restrictions under the Code continue unabated, notwithstanding the imposition of any one of the sanctions imposed vide s 33A(10) of the Securites Act 1993.

[50] Applying the same to the facts of the instant case, it follows that notwithstanding the imposition of a public reprimand, there was a continuing obligation on the part of the parties alleged to be acting in concert, ie IOI and LSC, to make a mandatory general offer.

[51] However while that obligation under statute continues, the issue before this court is somewhat removed or different. The issue here is not whether the obligation continues or otherwise (although the defendants have collectively sought to raise this as a defence), but rather whether the plaintiffs are entitled, premised on the failure of the defendants to make such an offer, to go on and found a cause of action in tort claiming damages. *Petaling Tin* is not, with respect, authority for such a proposition. The case does not in any way touch upon the conferral of any private law cause of action vis a vis the acquirer.

[52] In fact on the basis of the mandamus suit heard by Abdul Aziz JCA and discussed above, it is clear that there was no means of enforcing the obligation in the public law field vide the regulatory authority, the Securities Commission. In that case (which was upheld by the Court of Appeal) the learned judge concluded that there was a lacuna in the statutory enforcement provisions of the *Securities Commission Act 1993* as it stood at the material time, which precluded the court from issuing an order forcing the Securities Commission to make the defendants undertake a mandatory general offer. In short there was no enforceable remedy in the public law field.

[53] It is therefore now sought to seek a remedy in private law in tort vis a vis the 'acquirer' for breach of statutory duty. The point I seek to make is that *Petaling Tin* (above) affords no authority to comprise the basis for concluding that a cause of action is conferred by either the Code or the relevant provisions of the Securities Commission Act 1993 at the material time. The fact that the breach of an obligation prescribed by law continues, is not equivalent to saying that the person suffering from the effects of such breach is entitled to compensation for it. As noted at the outset, it might well be that there is no remedy for such breach, or an alternative remedy.

[54] Turning to the case of *Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor* [2003] 6 MLJ 49 the plaintiffs there were individual minority

shareholders of United Malayan Banking Corp Bhd ('UMBC') who held 5.01% of the issued and paid up voting shares of UMBC. The defendant Sime Darby Bhd and its subsidiary, Sime Darby Financial Services Holdings Sdn Bhd were desirous of acquiring the entire issued and paid up voting shares of UMBC. Having complied with the requirements of BAFIA, they entered into a conditional sale agreement with the UMBC Group to acquire the latter's entire shareholding of 60.35%. The Defendants then applied to the Securities Commission to waive the requirement of having to make a mandatory general offer under r 34.1 of the 1987 Take-Over Code for the remaining shares in UMBC should they proceed to complete the acquisition. The Securities Commission rejected the application but intimated that it would be prepared to consider a restricted mandatory general offer on the shareholdings of a number of private non-institutional investors who were essentially the plaintiffs. The defendants were successful here and procured the approval of the Securities Commission to make a restricted mandatory general offer for 5.01% of the plaintiffs' shareholding at a particular price. The acquisition then proceeded triggering r 34.1 of the Code. However the defendants did not make the mandatory general offer. Instead they wrote to the Securities Commission proposing a scheme to undertake the general offer in a different way, through another company. This was eventually approved in October 1997 such that the defendants were ready to discharge their statutory obligation. However due to the sudden economic downturn of 1997, the defendants found themselves unable to perform what they had set out to do. The Securities Commission wrote to the defendants in 1998 reiterating their obligation to carry out the mandatory general offer. Sime Darby Bhd was asked to show cause why action should not be taken against it under s 33(10) of the Securities Commission Act in respect of its failure to carry out the mandatory general offer. It explained by way of reply that it was unable to do so because of the economic downturn. A public reprimand was issued on 17 July 1998 where the Securities Commission also made it clear that the defendants were still obliged to make the mandatory general offer notwithstanding. The view was also expressed that legal proceedings could be commenced by an aggrieved party under s 33(9) of the Securities Commission Act. The plaintiffs in that suit then sought vide an originating summons, inter alia, a declaration that Sime Darby Bhd acting in concert with its subsidiary had a legal duty to extend an offer to the plaintiffs to undertake the mandatory general offer as well as an order that the defendants forthwith extend the mandatory offer to the plaintiffs in accordance with the Securities Commission Act and the Code.

[55] In the current suit the minority shareholder plaintiffs collectively claim compensation or damages for the failure of the defendants to undertake the mandatory general offer. They do not seek a declaration on the subsistence of a legal duty nor do they seek an order for the defendants here to undertake such a mandatory general offer, unlike the foregoing case. Instead they seek damages for losses they claim to have suffered as a consequence of such breach of the

continuing statutory obligation. The public law and private law remedies intersect to some extent in this matter, as in the mandamus suit, the court refused to issue an order of mandamus against the Securities Commission to make the defendants undertake the mandatory general offer on the grounds that the Securities Commission had no power to so enforce the making of an offer. The plaintiffs now seek to procure from the court in terms of a private law remedy damages for the failure to comply with the statutory obligation. In other words what could not be achieved vide a public law remedy is now being sought vide a private law remedy. However it is sought in terms of a cause of action based on a breach of a statutory 'duty' by the acquirer.

[56] Kang Hwee Gee J (as His Lordship then was) held that ss 33A(9) and (10) of the Securities Commission Act conferred a private law cause of action. This is what he said:

> ... To decide whether they had a cause of action it would be necessary to go further to examine the Act and the code in order to determine their purpose, in particular, whether they were enacted to protect the class of persons to which the plaintiffs belong. This is a matter of construction of the Act read with the code to determine the legislative intent (see *Wu Siew Ying v Gunung Tunggal Quarry & Construction Sdn Bhd & Ors* [1999] 4 MLJ 9).
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> There is unfortunately a dearth of case law in our jurisdiction with respect to the tests to be applied in determining liability for breach of statutory. Recourse must therefore be made to English case law for its persuasive guidance. Two opposing English decisions may be cited to illustrate the point …

[57] His Lordship then considered the cases of *Monk v Warbey & Others* [1935] 1 KB 75 where the Court of Appeal in England held that a cause of action lay against the owner of a motorcar who had breached his statutory duty under a road traffic statute and had permitted his car to be used by a person who was not insured against third party risks. It was held that the owner was liable to the third party who was injured by the negligent driving of the uninsured person. This was contrasted with *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 1 KB 539 where it was held that a breach of a statutory duty to keep a motorcar in a condition not to cause danger was only a public duty and a person injured by the breach had no remedy under the same statute although he could well succeed at common law. The principle in *Phillips* was approved by the Federal Court in *Tan Chye Choo & Ors v Chong Kew Moi* [1966] 2 MLJ 4 which held that the duty imposed by r 94 of the Motor Vehicles (Construction and Use) Rules 1959 was a public duty and not one enforceable by an individual. It could not, therefore, provide a cause of action under the rules to the plaintiffs in that case who had suffered injuries as a result of hte failure of the braking and steering system of the vehicle.

[58] His Lordship then considered *Lonrho Ltd v Shell Petroleum Co Ltd &*

Anor (No 2) [1982] AC 173, more particularly the general rule and the two exceptions outlined by Lord Diplock which have been considered above. He then applied the same to the provisions of the Securities Commission Act 1983 and the Take-Over Code:

> ... The objective of the SCA is basically to provide a regulatory framework for the securities and futures industries. Its functions are set out in s 15(1) of the SCA as follows:
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> 15(1) The Commission shall have the following functions:
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> ...
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> Of relevance to the present summons in the above subsections are (d) and (i) which specifically provide for the regulation of take-overs and mergers, and the suppression of illegal, dishonourable and improper practice in dealings in securities coupled with the power granted to the Commission under s 33(1) of the SCA.
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> Of the regulatory framework and the underlying principles of the 1987 code on take-overs and mergers made pursuant to s 33(3), Loh Siew Cheang in the 1996 edition of his book, Corporate Powers provides at p 375, a well researched overview of the code which I would accept as accurately describing the function and mission of the SC...

[59] His Lordship then quoted extensively from the book in relation to the functions of the Securities Commission. He then held:

> ... Having examined the SCA as a whole and in particular the function of the commission with respect to the administration, supervision and regulation of take-overs and mergers under s 15(1)(d) of the SCA, and the general principles and rules prescribing the standard of behaviour expected of a person undertaking a take-over or merger of a company under the 1987 code there could be little doubt in my mind that the SCA was enacted for the ultimate protection of a class of persons, namely of investors in general and specifically under Part IV thereof, the protection of a sub-class, namely of the existing shareholders of the company affected by a take-over or merger by the instrument of the 1987 Take-over and Merger Code which the acquirer is obliged to comply.
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> *It is to be noted that s 33(9) of the SCA had specifically exempted the errant acquirer from criminal prosecution under the SCA; and if one were to take the cue from the judgment of Lord Diplock in Lonrho, it would appear all the more likely that the legislature had not intended to preclude the right of shareholders aggrieved by the failure to make the MGO to seek legal redress under the SCA. On the contrary, after having been convinced that the SCA was enacted for the benefit of investors as a class, and the code for the benefit of a sub-class (of shareholders within the class of investors), I would venture to say that s 33(9) of the SCA had the effect of making it all the more clear that they had a right of action against the acquirer for breach of statutory duty under the code as it then stood. The position may now be different with the deliberate amendment in 1999 to the SCA by providing a new provision in s 33B(4) of the SCA to make any non-compliance of the*

code a criminal offence, which by contrast would now provide a strong indicator that the legislature has now had a change of mind to disallow a private cause of action.

I do not consider it necessary to embark on any further search for any other pointers as suggested by counsel for the defendants in order to discover whether the legislature had intended the breach actionable. One need not look any further — that intent is clear from s 15 and s 33(9) of the SCA and the code …

... For all the risks that the minority shareholders had to bear by the intrusion of the acquirer upon the status quo of their shareholdings, there must surely accrue to them some corresponding right to make a choice whether to stay or to leave; surely the failure of the acquirer to make a MGO could not be construed as anything less than an actionable wrong under the SCA which infringed the right of the remaining shareholders to make that choice; and having specifically provided under s 33(9) of the SCA that 'any such failure may, in any proceedings, whether civil or criminal, be relied upon by any party in the proceedings as tending to establish or negate any liability which is in question' the legislature could not have intended that the aggrieved party should take his claim somewhere else — for where else can he go to institute his claim but under the very statute that gave him the right. (Emphasis added.)

[60] His Lordship concluded by rejecting the argument that s 33(10) of the Securities Commission Act should be read as excluding the right of aggrieved persons from commencing a private law cause of action. He felt that these sanctions served the purpose of conveying the disapproval of the Securities Commission as a regulatory body and to put its integrity on notice to the investing community at large. He also held that the section served as notification to aggrieved persons, providing them with a starting point to consider whether to commence a civil action to enforce their rights. In coming to these conclusions, the learned judge relied on *Petaling Tin*.

[61] Two other cases which deserve brief mention are *Extreme System Sdn Bhd v Ho Hup Construction Company Bhd & Ors* [2010] MLJU 486 where my learned brother Mah Weng Kwai JC adopted the reasoning and judgment of Kang Hwee Gee J in *Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor* [2003] 6 MLJ 49; [2003] 8 CLJ 32.

[62] In *Chin Yew Loy Holdings Sdn Bhd lwn AU Metalvest (M) Sdn Bhd* [2002] 2 MLJ 326 Zulkifli J (now FCJ) allowed an application for specific performance against the defendant in that suit ordering him to make a mandatory general offer on the subject shares at a particular price, the defendant having failed to make the mandatory general offer required of it under the Code. However such a remedy was expressly provided for the prevailing legislation, unlike the instant case. In that case *s 33D(3)* of the then Securities Commission Act provided as follows:

A The court may, in a case where the Commission gives a direction under para(1)(a), on an application by the Commission make an order directing the defaulting person to comply with, observe or give effect to those provisions of the Code or rulings.

B **[63]** The position is therefore entirely distinguishable from the instant case as the prevailing legislation in the instant case contains no such express provision empowering the court to force compliance.

THE PRESENT FACTUAL MATRIX

C **[64]** The present case has similarities with *Aun Huat & Brothers v Sime Darby Bhd* (above) in so far as the non-adherence to the 1987 Take-Over Code is concerned. In like manner the Securities Commission also issued a sanction in the form of public reprimand but was unable to enforce or regulate due D performance in any other manner by reason of the lacuna in the legislation with regards to enforcement, as borne out in the mandamus suit. I have read and considered the reasoning in *Aun Huat*'s case which sets forth the basis for construing the then provisions of the Securities Commission Act and the Take-Over Code as allowing or conferring a cause of action in tort warranting E the remedy of damages for breach.

[65] The Supreme Court's decision in *Petaling Tin* (above) is binding on this court. That decision as stated earlier is authority for the principle that where a breach of the Take-Over Code occurs, that breach continues to subsist until a F general offer is made or the Panel/Securities Commission rules otherwise, notwithstanding that some other sanction such as a public reprimand is levied by the regulatory body. The case is not authority for the proposition, with respect, that a breach of the Take-Over Code allows the aggrieved party a remedy in damages in tort, more specifically breach of statutory duty. To G construe *Petaling Tin* so, would in my respectful view, extend, somewhat unjustifiably, the content of that judgment.

[66] There is a definable distinction between the subsistence of a continuing obligation and the right or entitlement to sue for a breach of that continuing H obligation. The latter proposition, in accordance with the guidelines on statutory interpretation, require particular basis for imputing the conferral of a private law cause of action sounding in damages. In other words, the fact that there is a continuing obligation, does not automatically warrant the conclusion that the person suffering from the breach, is entitled to damages in tort for such I breach. Nor does it follow that because there is a continuing breach, there is a clear means of enforcement by the regulatory body for such breach. The mandamus suit has borne out the fact that notwithstanding the continuing breach, due to a lacuna in the Securities Commission Act, there was no basis on which the court could assist or facilitate the Securities Commission to enforce

the statutory obligation. (That lacuna has since been rectified/filled by the enactment of statutory provisions entitling the Securities Commission and the court to enforce the statutory obligation). In short *Petaling Tin* (above) is not authority for the proposition that this court can either enforce compliance with the Take-Over Code vide the Securities Commission or that it can award damages in private law for breach of statutory duty on the basis of the legislation as it then stood.

[67] If *Petaling Tin* (above) cannot comprise the basis for concluding that a private law cause of action is conferred by the relevant provisions of the Securities Commission Act and the Take-Over Code, it remains to be considered, in the light of, inter alia, the guidelines set out above, whether the provisions of the statute and the Code allow for the conclusion or inference that Parliament in fact intended to confer such a private law cause of action in the event of default.

[68] The *Take-Over Code* was originally promulgated and gazetted as *PU(B) 173/1987* and was amended vide PU(B) 44/1989 pursuant to *s 179 of the Companies Act*. The said section conferred upon the minister the power to appoint a panel on take-overs and mergers to prepare and administer a code containing general principles and rules to be complied with by all parties concerned in a take-over and merger transaction. There are points of significance here. One that the Take-Over Code is therefore delegated legislation having the force of law (see *Petaling Tin*). Secondly, it is relevant that prior to the powers of enforcement being transferred to the Securities Commission, the same powers of enforcement were available to the Panel. In fact the provisions of s 179(7) of the earlier Companies Act 1965 was identical with *s 33A(9) of the Securities Commission Act* providing that a failure to adhere to the Code '... shall not Itself render that party liable to criminal proceedings but any such failure may, in any proceedings, whether civil or criminal, be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in the proceedings'. And the then *sub-s (7A)* was identical to *s 33A(10)* of the Securities Commission Act conferring on the panel the power to invoke the sanctions of a private reprimand, public censure or temporary or permanent deprivation of enjoyment of the facilities of a stock exchange.

[69] The point is that these self-same provisions, entirely unchanged, were directly imported into *ss 33A(9) and (10) of the Securities Commission Act*, when the regulatory function in relation to mergers and take-overs was delegated to the Securities Commission with the ultimate aim of ensuring a regulated and orderly financial market. It is therefore significant that notwithstanding that the Securities Commission undertook the regulation of mergers and take-overs at the material time in 1997 and 1998, the provisions of the Securities

Commission Act 1993 conferred powers on the Securities Commission that were identical to that enjoyed by the panel on take-overs and mergers under s 179 of the Companies Act 1965. There was no further extension or expansion of their regulatory or enforcement powers under the Act in 1997 and 1998. If any cause of action in tort for breach of statutory duty exists, then it follows that such a cause of action must have subsisted from the inception of these proceedings, under s 179 of the Companies Act 1965. It is not clear that Parliament intended to confer such a cause of action when enacting s 179 of the Companies Act 1965. This must be the starting point for any analysis of the subsistence of such a cause of action subsequently, because the provisions in the subsequent Securities Commission Act 1983 are identical and were directly imported from s 179 of the Companies Act with no change whatsoever. To my mind therefore, the history of the section does not provide any basis for inferring or concluding that Parliament intended to confer a private law remedy sounding in damages on aggrieved parties. The wording in *s 179* which deemed the decision of the panel on take-overs and mergers as final and conclusive rather lent itself to the public law challenge of judicial review. On the scale of indicia for and against the conferring of a right of action in tort therefore, the history and wording of the relevant sections do not lend themselves to the interpretation that Parliament intended to confer a private law remedy in tort.

[70] Turning then to the express words utilised in the material sections, namely *ss 33A(9) and (10)*:

> (9) Subject to subsections (6), (7) and (8), a failure by any party concerned in a take-over or merger transaction to observe any of the general principles and rules in the Code *shall not of itself render that party liable to criminal proceedings but any such failure may, in any proceedings, whether civil or criminal, be relied upon by any party to the proceedings as tending to establish or to negate any liability which is in question in the proceedings.*
>
> (10) Notwithstanding subsection (9), where any party concerned in a take-over or merger transaction fails to observe any of the general principles and rules in the Code, the Commission may, after giving the party an opportunity to be heard, invoke such sanction as private reprimand, public censure or temporary or permanent deprivation of enjoyment of the facilities of a stock exchange as it deems fit. (Emphasis added.)

[71] *Section 33A(9)* by its express words provides that there shall be no criminal sanction for a breach of the Code. If read in isolation this might well lend itself to the conclusion that some other remedy, such as a private law remedy, was encouraged. However the section goes on to state that while the breach does not itself form the basis for a criminal offence, such breach may be

utilised in other civil or criminal proceedings where there is some liability in question in those proceedings by either party, to negate or establish the existence of such liability.

[72] In *Aun Huat* (above) the learned judge considered that these words warranted the conclusion that Parliament intended that parties could enjoy a private law remedy in tort. With the greatest of respect and considerable regret, I am unable to follow or adopt the construction taken in that court. It appears to this court that the words allow the fact of the breach to be utilised as evidence in other proceedings, albeit civil or criminal, to substantiate or negate any liability in issue in those proceedings. This presupposes the existence of a cause of action which gives rise to a liability other than that created by the section in question. Put another way, this means that there is some other liability in issue there. The provision presupposes the existence of some other cause of action in respect of which this non-compliance can be adduced as evidence to facilitate the procurement of judgment or to negate liability under that cause of action. There is nothing in those words that appears to confer an entitlement to compensation or damages for non-compliance of the Code by the acquirer. Instead the section envisages that where proceedings premised on some other cause of action are instituted, the non-compliance may be used as evidence. But it does not appear to suggest that the fact of non-compliance in itself comprises a basis for a cause of action in tort.

[73] It is to be noted that the section makes reference to criminal proceedings other than proceedings for a breach of the Code. Indeed the question may be asked, what criminal proceedings are being contemplated in that section? The answer must be any criminal proceedings and in the course of establishing or negating liability in issue there, the fact of non-adherence to the Code may be used to supplement or negate that particular liability in issue in those proceedings. Such liability clearly cannot mean liability for non-adherence to the Code.

[74] Does s 33A(9) read in its entirety warrant the inference that Parliament intended to create a private law tort remedy for breach of the same, or breach of the Code? It is argued in *Aun Huat* (above) that the section serves to protect a class or sub-class of investors, namely minority shareholders. This is indeed true. It is beyond dispute that the object of the relevant r 34 of the Code and the concert party provisions is to ensure the prevention of the take-over of the control of a company by stealth (see *Petaling Tin (above)*). More particularly, r 34 requires any person or group of persons acting in concert who acquires shares in a company carrying more than 33% of voting rights, to make a bid for all the other shares of that company at the highest price paid by the offeror for the shares in the previous twelve months. The policy of the Code is to require a new controller to give an opportunity to the other shareholders of quitting

the company and sharing in the price paid for the control or its consolidation, because the character of the company may have changed (*Petaling Tin above*). The object of r 34 is therefore to prevent the offeror obtaining de facto control of the company's board before it has implemented the mandatory bid.

[75] The issue here is whether given that policy and background, the words of s 33A(9) can be construed as having created, by implication, a private law cause of action for breach of statutory duty. It appears to me that this is not the case. While it is true that the Code and hence the regulatory provisions are enacted for the benefit of a sub-class, it is equally true that this in itself is insufficient to warrant the conclusion that such a cause of action was conferred by the particular statute. This is true of both the cases of *X (minors) v Bedforshire City Council* (above) per Lord Wilkinson-Browne, as well as Lord Diplock in *Lonrho v Shell Petroleum Co Ltd (No 2)* (above) where specific reference was made to the fact that where legislation is enacted for the specific benefit of a particular class of persons, it comprises an indicator of the fact that Parliament intended to confer such a private law cause of action. However in both those cases, while this principle was acknowledged, the ultimate finding was that notwithstanding this, the overall intention of the particular statute in question did not intend to confer such a private law cause of action.

[76] I would in fact invoke Lightman J in *Melton Medes Ltd and another v Securities and Investments Board* [1995] 3 All ER 880 and respectfully adopt the reasoning undertaken in that case. Indeed the Securities Commission Act 1983 created an elaborate scheme of regulation backed by a mix of enforcement mechanisms, each of which was earmarked to a duty in question. The duty to comply with the Take-Over Code was ear marked by enforcement vide primarily *s 33(10)* and to a lesser extent, *s 33A(9)*. It is true that there was no criminal sanction which is another indicator warranting the inference that Parliament intended to create a private law remedy. However to my mind such an indicator, even if given credence, is overridden by the overall function and purpose of the Securities Commission Act. The Securities Commission is a senior regulator in the public interest and specifically in the interest and for the protection of investors. The purpose of the section in dispute, is to control, primarily in the public interest, the enforcement of the Code as a whole, and not specifically r 34. More significantly the section was not intended to create a private law cause of action for the acquirer. It was created to provide the regulator, namely the Securities Commission with an armament of remedies to enforce adherence to the Code and not to subject either the Securities Commission or the 'acquirer' under the Code with a private law remedy in tort. In fact it would not be unfair to say that in promulgating the provisions, it was primarily the powers of the Securities Commission that was at the forefront of Parliament's 'mind' rather than the creation of any private law cause of action in tort in favour of an 'acquirer' under the Code. The whole thrust of the

Securities Commission Act is framed to confer powers and duties of enforcement and regulation on the Securities Commission. It is not 'geared' to arm an acquirer with private law remedies in tort. It is after all open to the acquirer to found a cause of action in common law or otherwise and to utilise the fact of non-adherence to the Code to substantiate liability. But it is an entirely different matter to rely on the Securities Commission Act, which deals primarily with the enforcement and regulatory duties of the Securities Commission, a statutory body clothed with a public law duty of ensuring fair and orderly financial markets, to seek to found a cause of action in tort for the 'acquirer' under the Code. The 'acquirer' is a player in the financial markets, and while the Securities Commission Act was enacted to regulate parties such as the acquirer, it would be difficult to contemplate the creation of a private law cause of action in favour of an aggrieved party against an 'acquirer' under that Act, rather than the statutory body. In other words, if the question were whether a private law cause of action subsists against the Securities Commission for failing to comply with its statutory duty of enforcing the Code by the acquirer, the foregoing cases would be far more relevant. As matters stand, it cannot be said, in my view, that Parliament intended to confer a cause of action in tort against the 'acquirer' by virtue of s 33A(9) of the Act.

[77] In further support of this conclusion, *s 33A(10)* provides express sanctions for a failure to comply with the provisions of the Code. The fact that these are 'punishments' available for non-adherence to the Code cannot be debated. The extent of such sanctions, after compliance with the rules of natural justice by allowing the parties an opportunity to be heard, includes a wide range of sanctions such as a private reprimand, public censure or temporary or permanent deprivation of the enjoyment of the facilities of a stock exchange as deemed fit. The last sanction is particularly onerous, allowing the Securities Commission to deprive a defaulting party permanently of the use of the facilities of the stock exchange. Such a sanction cannot be viewed lightly. Can it, in reality, be said that there is no effective penalty for the failure to comply with the Code? On the contrary, it appears to this court that there are more than sufficient sanctions/penalties to ensure full compliance with the Code. The fact that the Securities Commission chose not to effect any of the more grave sanctions available in its armament, cannot found the basis for contending that there exists a private law cause of action in tort.

[78] The fact that vide its amendment Act A926, clear powers of enforcement allowing the Securities Commission to direct the defaulting party to comply with the Code, and the High Court to enforce such a direction, suggest that the 'lacuna' pertaining to direct enforcement was rectified. The addition of a provision to make non-compliance of the Code a criminal offence further lends weight to the proposition that there is no cause of action in tort now available to the aggrieved party.

[79] The final *indicium* that remains to be considered is that of damages. As stated earlier on, one of the considerations that arises in deciding whether a cause of action subsists is whether the aggrieved party suffered damage which the Act contemplated he ought to be compensated for in the event of a breach. Put another way does the harm which the plaintiffs here have suffered fall within the area of the harm against which the legislature intended to guard? Has the breach of the statutory obligation here actually caused the harm complained of by the plaintiffs?

[80] The often cited case to illustrate this point is that of *Gorris v Scott* (1874) LR Ex 125 where the plaintiff could not recover for the loss of his sheep occasioned by the lack of pens on board the ship from which they were washed overboard. The statue in question requiring pens to be used to fence in sheep was aimed at public health considerations and not the physical safety of the ship. In *Fytche v Wincanton Logistics Plc* [2004] UKHL 31damage was caused by water penetrating a hole in a boot was held to be different from damage caused by crushing and hence not within the purview of the legislation.

[81] The mischief which the Take-Over Code seeks to preclude as discussed above is the take-over of a company by stealth. To this end by virtue of *rule 34*, the acquirer is bound to make a mandatory general offer enabling the minority shareholders to exit the company at the price at which the acquirer is gaining control of more than 33% of the voting shares of the company. The failure to comply with the Code means that technically in the instant case, the acquirers procured the trigger point of slightly over 33% of the shareholding of Palmco without make the requisite mandatory general offer. What harm did the plaintiffs therefore suffer? Does their claim encompass the damage they suffered as a consequence of being unable to exit the company at a price of RM4.30 (the price at which the acquirers purchased the shares and thereby 'control') soon after March 1997? Or August 1998? How is that computed?

[82] It is therefore necessary to examine the plaintiffs' claim for damages based on the harm they contended they have suffered. The plaintiffs divide themselves into two groups premised on when they disposed of their shareholding in Palmco. The first group comprising the first, second, third, fifth and sixth plaintiffs disposed of their Palmco shares on 18 July 2001 when they accepted a conditional mandatory offer from IOI to exit Palmco. The second group of plaintiffs comprising the fourth and seventh plaintiffs disposed of their shareholding on various dates at various prices due to their inability to repay their margin facility.

[83] The first group claims a measure of damages amounting to the difference between the price at which the mandatory offer ought to have been made, in or around 28 May 1999 or thereafter (ie RM4.35) and the market

value of the shares on the date the mandatory offer ought to have been made (approximately RM1.31). I am unable to comprehend or accept the basis of such a measure of damages for the following reasons: If this group of minority shareholders had indeed disposed of their shares soon after being alerted of the take-over (which was publicly announced) as a consequence of the failure of the acquirers to undertake a mandatory general offer, because they wanted to exercise their rights to exit the company, then the damage they would have suffered would indeed have been reflected by the difference between the price at which they actually disposed of the shares, ie the market price on the one hand, and the offer price on the other hand (ie offer price — Actual sale Price procured by minority shareholders).

[84] However the reality of the factual matrix in this case shows otherwise. This group of shareholders did not sell their shares in an attempt to exit the company by reason of the acquisition of control of Palmco by the acquirers. In fact, the first, third and fifth plaintiffs increased their shareholdings and acquired additional warrants between 1998 and 1999, after the take-over by the defendants. The other plaintiffs in this group also did not exit Palmco despite the public announcement of the reconstitution of the Board of Palmco in March 1997. In short there was no exit by this group of shareholders by reason of the takeover of control of Palmco by the acquirers, an avenue or right which is protected by the Take-Over Code. In fact, even after representations were made to the Securities Commission etc for enforcement of the statutory obligation, there was no exit, but in fact an acquisition of further shares and warrants. In the final analysis, these shareholders disposed of their shares in 2001, when a conditional mandatory offer was made by IOI (albeit not in the context of the trigger of the 33% threshold in March 1997 and August 1998). In these circumstances it is not possible to logically conclude that these plaintiffs suffered a loss. Any such loss would be entirely hypothetical, given that these plaintiffs finally disposed of their shareholdings (increased shareholdings, in some instances) at a profit, namely at a price of RM4.60 in 2001. (The defendants have estimated a capital gain of between (R5.7 and RM6.7m collectively instead). Any loss claimed is therefore theoretical as opposed to actually incurred loss.

[85] More significantly it is not loss which it was envisaged would be suffered by a breach of the statutory obligation to undertake a mandatory general offer under *r 34 of the Take-Over Code*. The loss which the plaintiffs make claim for, pre-supposes that they sold their shares or exited Palmco at the considerably lesser market price at the material time, ie in or around May 1999, rather than enjoying the benefit of an exit at the offer price of RM4.30. As this did not happen, it cannot be said that such loss was incurred. In fact these plaintiffs in the first group are unable to show that they suffered any loss.

[86] Turning to the second group of plaintiffs, namely the fourth, and seventh plaintiffs, it is submitted for these plaintiffs that the measure of loss available to them is the difference between the price at which the mandatory offer ought to have been made and the actual disposal price of the shares. The same measures is also claimed for the sixth plaintiff. A perusal of the dates of disposal through their respective margin facilities discloses that these plaintiffs' shares were sold periodically over a period of time between December 1997 and June 1998. As candidly conceded by the plaintiffs, these shares were disposed of because these plaintiffs were unable to adhere to the requisite margins in their margin facility accounts, resulting in a breach of the same and foreclosure. Can it then be said that these disposals by way of foreclosure were caused by the acquisition of control of Palmco by the acquirers? No. Instead the clear conclusion to be drawn is that the shares were sold as a consequence of the breach of margin limits and margin facility agreements. The breach of the statutory obligation by the acquirers also took place in or around May 1999 or earlier, but these disposals cannot be said to have arisen as a consequence of such acquisition of control. Accordingly any damages suffered or claimed, cannot have flowed from or as a consequence of the breach of a statutory obligation by the defendants.

[87] It is evident from the foregoing that the loss claimed to have been suffered by the plaintiffs (if at all) was either not incurred, or arose as a consequence of matters other than a breach of the statutory obligation by the defendants. In short it cannot be concluded that the damage claimed by the plaintiffs here was either incurred, or of the kind contemplated as arising as a consequence of the breach of the statutory obligation under the Take-Over Code.

[88] Having studied the necessary indicia in some detail, and having considered the ambit of the Take-Over Code 1987 and the Securities Commission Act 1993 as it then was, it appears to this court on an appreciation of the totality of the circumstances that the statute and the Code does not confer a private right of action in tort sounding in damages. The net result of my conclusion is that the plaintiffs do not enjoy any right of action against the defendants in tort for a breach of statutory duty or the breach tort as it is commonly called. Accordingly no entitlement to damages can flow. On this premise the plaintiffs' claim is dismissed as disclosing no cause of action.

THE TRIAL

[89] It should be pointed out that this matter in fact was adjudicated in full at trial with several witnesses testifying on various aspects of the case, particularly the defendants, in relation to their acquisition of various shareholdings which acted as a trigger for r 34 of the Take-Over Code and

'acting in concert'. The matter proceeded thus because the issue of whether or not a cause of action in tort for a breach of statutory duty existed was presumed, and left to be dealt with during the course of submissions. It was only at this latter stage, ie during submissions that this court, of its own volition, directed the parties to submit further on two issues which I felt were of primary importance, namely:

(a) the existence of such a cause of action as had been pleaded by the plaintiffs, namely a breach of statutory duty as a tort (or the breach tort); and

(b) whether it was open to the defendants to collaterally challenge the findings of the Securities Commission given that these same defendants had never challenged by way of judicial review or otherwise the validity of the Securities Commission's findings in any other suit or any of the other related proceedings filed in court, more particularly in the absence of the Securities Commission as a party in this suit.

[90] I have dealt with issue (a) and concluded that no cause of action is conferred by the statute enabling the plaintiffs to claim damages in tort against the plaintiffs. While this concludes the adjudication of the case, in so far as this court is concerned, it is necessary for me to touch on issue (b) for completeness. It is necessary to explain why I do not deal with nor adjudicate on the issue of the evidence adduced during the entirety of the trial. This was in fact a question posed by this court at the end of trial, namely whether this court was bound by the findings of the Securities Commission in relation to whether or not the Take-Over Code had been triggered. Learned counsel for the plaintiffs and defendants all concurred at the end of trial that this court was not 'bound' by the findings of the Securities Commission, and that it was at liberty to re-examine, ab initio, as it were, the entirety of the issue relating to the trigger of the 33% shareholding threshold by the defendants in March 1997 and August 1998. Indeed it must be said that the bulk of the case for the defendants turns on a re-examination of the primary facts giving rise, inter alia, to the 'trigger' of the threshold 33% and the steps taken by the Securities Commission to enforce r 34 of the Code. The defendants contend by way of substantive defence to the plaintiffs' claim in tort, variously that:

(a) The threshold requirements for a take-over had not been met, in that the defendants were neither 'acting in concert' nor were they intent on 'obtaining or consolidating control of the company'. Additionally it is contended that the 33% threshold was never triggered because Id's agreement to acquire 32.96% of the shareholding of Palmco from Mega First was conditional and only completed on a T+21 day basis. The conditions requiring the approval of the Foreign Investment Committee and the nomination of four directors was not met when IOI acquired a further 38,000 shares on 25 March 1997. In short the contention is that

A the shareholding could not be aggregated in view of the T+21 market requirement and other conditions not having been fulfilled;

(b) the threshold even if triggered momentarily, was so minimal that it does not warrant being treated as amounting to an attempt to assume control of Palmco by stealth — the de minimis principle;

B

(c) that the letter of reprimand from the Securities Commission comprised the 'final punishment' for the technical breach, thereby exonerating these defendants from having to undertake a mandatory general offer; and

C (d) the plaintiffs have not suffered claimable damage arising as a consequence of the breach of the statutory obligation (as discussed above). Additionally there was no basis whatsoever for the claim for exemplary damages.

D

[91] I have set out at the outset a potted history of this case commencing with the actions taken against the defendant acquirers by the Securities Commission for a breach of the Take-Over Code 1987, followed by the Mandamus suit and the current suit framed as a private law action in tort. The E chronology of events discloses that the Securities Commission, in or around 1999 concluded, having accorded all parties an opportunity to be heard, that r 34 of the Take-Over Code had in fact been breached and that the punishment to be accorded to IOI and the first defendant for such breach was a letter of reprimand. This did not, as discussed earlier, absolve the defendants from F undertaking a mandatory general offer and they were directed to do so. The defendants did not, at any stage, seek to challenge the findings of the Securities Commission in relation to its finding of a breach. While they maintained that there was in fact no such intentional breach, this was said by way of mitigation rather than by way of challenge, primarily in response to the show cause letter. G There was no attempt made by way of judicial review to challenge the decision of the Securities Commission that their essential finding that the Take-Over Code had been breached, was flawed or erroneous. The defendants simply did nothing. They did not undertake the mandatory general offer as directed, but neither did they challenge the findings of the Securities Commission.

H

[92] When the plaintiffs sought to enforce the directive of the Securities Commission to make IOI and the second defendant undertake a mandatory general offer in the mandamus suit, again no challenge was made on the lines now sought to be made in this suit. In the current suit however, the Securities I Commission is not a party. It is absent and cannot be heard. In these circumstances, these plaintiffs and defendants contend that it is open to this court to undertake a comprehensive review of all the primary facts leading up to the decision of the Securities Commission that r 34 of the Take-Over Code was breached, and to 'overturn' or reverse that decision, all in the absence of the

Securities Commission. In short the statutory body will not be heard in its defence. This appears to this court to amount to a clear breach of the first principles of natural justice.

[93] Even if such an exercise were undertaken, it could theoretically result in this court concluding that the Securities Commission was mistaken in coming to the conclusion it did. This would then mean that the decision of the Securities Commission would be reversed no less than 12 years after it had handed down its decision and sanction, in its absence and without according it an opportunity to present its views or explain how and why it so concluded. The net effect of such a decision would be to set aside the decision of the Securities Commission retrospectively in its absence. This appears to this court to be clearly wrong. In essence it amounts to a collateral subsequent attack on the decision of the Securities Commission which should be treated as final, because no attempts were made to reverse or challenge this decision earlier. Estoppel comes into play precluding the defendants from seeking to reverse or challenge the findings and decision of the Securities Commission to the effect that r 34 of the 1987 Take-Over Code was breached.

[94] The Latin maxim, *Interest reipublicae ut sit finis litium* means it is in the interest of the state that lawsuits be not protracted. In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 Peh Swee Chin FCJ traced the history of res judicata and estoppel commencing with the passage by Wigram VC in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115:

> ... The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

[95] In the context of the present case, it was open to the parties, particularly the defendants, to challenge the correctness or otherwise of the decision of the Securities Commission after it handed down its decision in 1999 and again during the course of the mandamus suit. Not having done so, it does not appear to be tenable to seek to pursue such a challenge now in these proceedings in the absence of the Securities Commission as a litigant.

[96] In the United Kingdom, in a case where there was an attempt to obtain an order under the United Kingdom matrimonial legislation following upon a comprehensive divorce settlement in a California Court, the High Court rejected the same, holding that there has to be finality and an end to litigation, (see *Hewitson v Hewitson* [1995] 1 All ER 472). In another case a convict attempted to reopen a conviction by suing his solicitor in negligence. This was

rejected by the court as an abuse of process, in that it amounted to an attempt to make a collateral attack, through fresh proceedings, on a decision which should be treated as final, (see *Smith v Linskills (a firm)* [1996] 2 All ER 353).

[97] The issue that is sought to be 'relitigated' or re-examined, in a sense here, is whether or not there was a breach of *r 34 of the Take-Over Code 1987*, when that issue was not challenged after the decision of the Securities Commission in 1999, nor in the mandamus suit. Issue estoppel arises, in that it amounts to an abuse of process to raise in subsequent proceedings, matters which could and therefore should have been litigated in earlier proceedings. For this reason I have concluded that it is not open to this court in any event, to consider and adjudicate upon the basket of defences that have now been put forward by the defendants in an attempt to launch a collateral attack against the decision of the Securities Commission, albeit by way of defence. This conclusion is of theoretical value, in view of my conclusion above, that there is no cause of action available to the plaintiffs in tort sounding in damages. Nonetheless, I have alluded to this matter, as evidence was heard on these defences during the course of trial. It might well be contended that it was necessary to consider the veracity and value of such evidence. However I am of the view that it is not open to this court to do so for the reasons I have outlined here in relation to estoppel. Accordingly the defendants are, in my view, precluded from denying or seeking to exculpate themselves from the effect of the decision of the Securities Commission through these proceedings.

[98] In conclusion, for the primary reason cited above, namely that there appears to be no plausible cause of action available to the plaintiffs in tort for a breach of statutory duty or the breach tort, as it is commonly known, the plaintiffs' claim is dismissed with costs.

Claim dismissed with costs.

Reported by Ashok Kumar